Annex 2
Case: 0906783

Results from the consultation on NPT's notification of decisions in the market for voice call termination on Lycamobile Norway Ltd's mobile network (market 7)

13 May 2011

Contents

1 Introduction

This document summarises the responses to the consultation on the Norwegian Post and Telecommunications Authority's (NPT's) notification of decisions in the market for voice call termination on Lycamobile Norway Ltd's mobile network (market 7). The notification was circulated for national consultation in the period 2-23 March 2011.

The following submitted responses to the consultation:

- Norwegian Competition Authority
- Lycamobile Norway Limited (NUF) (herein referred to as Lyca)

NPT has not received any comments on the responses to the consultation.

The statements from the various commenting bodies are summarised by subject and according to the individual paragraphs in the notification. The focus has been on separating out the most relevant and characteristic comments. NPT will also briefly summarise its views on the relevant comments and state how it has dealt with the input.

The individual responses to the consultation are posted on NPT's website.[1]

2 The procedure

Consultative input

Lyca (pages 3-4) refers to NPT's previous notification of decisions and decisions in market 7, and points out that Lyca was not covered by these and was not consulted when NPT's notification of decisions in market 7 was circulated for consultation on 26 March 2010. Lyca believes that the procedure NPT has used to make the decision in market 7 of 27 September 2010 applicable to Lyca was not in accordance with the Public Administration Act or the Electronic Communications Act (page 5).

Lyca also believes that NPT has no grounds for publishing Lyca's prevailing non-regulated termination charges (page 5).

Lyca further believes that NPT has made a one-dimensional legal interpretation of Lyca's interconnection agreements (pages 5-6). NPT has no grounds to do this, and the effect is that, in reality, NPT has regulated Lyca's termination charges and changed the terms of Lyca's interconnection agreements. However, Lyca believes that NPT's understanding of the agreements is incorrect. At the time of signing the agreements, Lyca had not accepted future price reductions in accordance with sliding paths which, at the time, had not been determined or published by NPT.

NPT's assessment

As stated by Lyca itself, NPT's notification of decisions in market 7 of 26 March 2010 and NPT's subsequent decision of 27 September 2010 were not aimed at Lyca. The company was not, therefore, directly approached by NPT in connection with the national consultation. However, the notification was published on NPT's website, and all interested parties were given the opportunity to submit comments on the notification. Likewise, the decision was also

[1] See http://www.npt.no, under the menu option "SMP".

published on NPT's website, along with details of how to appeal and appeal deadlines. Lyca has therefore had the opportunity to comment on previous decisions.

Through NPT's notification of decisions on 2 March 2011, which directly relates to Lyca, Lyca has, nevertheless, been notified and given the opportunity to comment on the notification. Lyca will also have the opportunity to appeal NPT's final decision when it is issued, according to standard rules. Thus, NPT believes that the requirements for consultation and advance notification under the provisions of Section 9-2 of the Electronic Communications Act and Section 16 of the Public Administration Act have been met.

With regard to Lyca's statement that NPT has no grounds to publish Lyca's termination charges as applicable from 1 January 2011, NPT points out that this charge was, and still is, publicly available on the website of Telenor ASA (Telenor).[2] It will also be necessary for the termination charge to be known out of consideration to the providers that send traffic to Lyca's customers, including providers that send this traffic in transit via Telenor's network. In the notification, NPT has only quoted the termination charges of Lyca that were already publicly available.

It is inaccurate to say that NPT has made a detailed interpretation of the private law agreements between Lyca and Telenor and NetCom AS[3] (NetCom) respectively. On the other hand, in the assessment of how much buyer power Lyca is exposed to, NPT has quoted a provision in the interconnection agreement between Lyca and Telenor. NPT has interpreted the said provision to mean that Lyca's termination charge shall not exceed the termination charge of other regulated MVNO providers. As NPT understands Lyca's response to the consultation, Lyca believes that the provision sets limits to a lesser degree than those applied by NPT for the maximum termination charge that Lyca can demand pursuant to the agreement. Thus, it appears that NPT's notification has assumed that Lyca has been exposed to buyer power to a greater extent than has actually been the case. In view of this, NPT believes that Lyca's argument does not detract from NPT's conclusion that Lyca can act independently of competitors, customers and consumers to a large extent. NPT has not, through its assessment of buyer power, regulated Lyca's termination charges ahead of NPT's own decision or changed the terms in Lyca's interconnection agreements.

3 Comments on the market analysis

3.1 Description of Lyca

Consultative input
Lyca (page 1) points out that the company's head office is in Ireland and not the UK, which NPT incorrectly stated in section 2.2 of the market analysis.

NPT's assessment
NPT has updated section 2.2 of the market analysis based on Lyca's comments and other information Lyca has provided in its consultative input.

---

[2] http://www.jara.no/produkter/telefoni/samtrafikk/priser_terminering_tredjepart_og_utland/priser_term_tredjep_utland.jsp
[3] NetCom changed its name to TeliaSonera Norge AS in 2011.

3.2 Definition of MVNO

Consultative input

Lyca (pages 8-9) points out that NPT's definition of MVNO in section 2.2 of the market analysis is a definition of a full value MVNO. In Lyca's opinion, an MVNO from a customer perspective is a company that offers mobile services under a specific brand. According to NPT's definition, Lebara AS, which is Lyca's closest competitor in the Norwegian market, will not be an MVNO. Lyca believes that the effect of NPT's definition is that Lyca and Lebara are regulated differently, even although the customers' perception of the companies is the same. Calls that are terminated to Lebara's number series will have a higher termination charge than calls that are terminated to Lyca's number series, despite the fact that Lebara has been in the Norwegian market longer than Lyca, and despite Lebara not having transmission capacity and a mobile network infrastructure. Lyca observes that the regulation of termination charges is relevant within the EEA, and consistent use of definitions between the countries is therefore important.

NPT's assessment

NPT has used the same definition of MVNO in all of its decisions in the mobile markets, both in the termination markets (market 7, former market 16) and the market for access and call origination on public mobile telephone networks (market 15). However, the Authority is aware that the term MVNO is used differently in certain contexts. For example, Ofcom[4] uses the term MVNO in relation to all mobile providers that do not have their own radio network, while NPT has limited the term to mean service providers. In the markets for termination on mobile networks, however, the key question is not how MVNO is defined, but whether the relevant provider controls the access to terminate voice telephony with its end users, and can enter into its own interconnection agreements with other providers. According to NPT's definition, Lyca is an MVNO provider that controls the access to terminating voice telephony with its own end users and can enter into its own interconnection agreements. NPT has therefore found it necessary to analyse the market for termination on Lyca's mobile network.

With regard to Lebara AS, the company is a part of the Network Norway group, which is made up of the brands Lebara, OneCall and Network Norway. Lebara does not have its own interconnection agreements, but uses instead Network Norway's network infrastructure and interconnection agreements as a basis for producing its services. Since Lebara is not a provider of termination, the company is not directly subjected to the termination regulation. Termination of calls to Lebara's customers will, however, be regulated through the regulation of Network Norway's termination offer. As stipulated in NPT's decision of 27 September 2010, in its regulating of Network Norway, NPT has emphasised that the group is investing in the building of a new mobile network together with Tele2. Network Norway is therefore permitted to charge a higher termination charge for a limited period. How Network Norway organises its activity is up to the company to decide. The fact that Lyca and Lebara are competitors in the retail market is not in itself a ground for regulating this part of Network Norway's activity differently from the company's other mobile activity according to NPT.

NPT sees no reason to change the definition of MVNO.

[4] http://stakeholders.ofcom.org.uk/binaries/consultations/combined-award/annexes/Annex_6.pdf, section 2.2.

3.3 Assessment of significant market power

Consultative input

Lyca (pages 7-8) believes that the fact that the company had to agree to lowering its termination charge in order to enter into necessary interconnection agreements shows that Lyca is not in a position to exercise market power in the relevant market. Lyca could not set a termination charge that was significantly higher than could be expected in a competitive market. Telenor and NetCom have applied the same principle to Lyca's termination charge as for other comparable operators in the Norwegian market. NetCom also generates wholesale revenues from traffic to and from Lyca's customers, including traffic that is generated by Lyca's customers and terminates in NetCom's network. Likewise, Telenor generates income from mobile traffic that is sent in transit through Telenor's network to or from Lyca's customers. Telenor also receives termination revenues from traffic generated by Lyca's customers and revenues from other services that Telenor supplies to Lyca. NPT cannot ignore such facts.

NPT's assessment

In section 3.5.2 of the market analysis, NPT assessed whether Lyca is exposed to buyer power in the Norwegian market to such an extent that it gives grounds to depart from the presumption that Lyca has significant market power in the relevant market. In the assessment, NPT has observed that Lyca has had to accept a termination charge at the same level as TDC and Ventelo and that this indicates that the company has been exposed to a degree of buyer power. As stipulated in the analysis, however, NPT believes that the buyer power Lyca is exposed to is not sufficiently effective to depart from the presumption that the company can act independently of customers, competitors and consumers in the market for voice call termination on its own mobile network. NPT does not believe that Lyca's comments form a basis for changing this conclusion. With regard to Lyca's statement that NetCom and Telenor have applied the same principles for Lyca's termination charge as for other comparable operators, NPT notes that the Authority has not found that other operators have been exposed to buyer power that has been sufficiently effective.

As stipulated in section 3.5.2 of the analysis, NPT has acknowledged that NetCom and Telenor are in a special position, both as the largest buyers of termination and as sellers of wholesale services to Lyca, and NetCom and Telenor's buyer power is therefore assessed separately. However, NPT does not believe that the fact that Lyca buys other services from NetCom and Telenor is a basis for changing the conclusions that Telenor and NetCom cannot exercise buyer power over Lyca that is sufficiently effective to change the conclusion that Lyca has significant market power. Furthermore, NPT notes that it also found no indication that Telenor and NetCom have been able to exercise such buyer power in the analyses of significant market power of other providers of termination.

Based on the comments, NPT finds no grounds to change the conclusion that Lyca has significant market power.

4 Comments on notification of decisions

4.1 Price and accounting controls

4.1.1 Relationship to wholesale regulation

Consultative input

Lyca (pages 9-10) notes that the company has entered into agreements with NetCom and Telenor on the basis of approved and published termination charges on the date of signing. As a result of NPT's decision of 27 September 2010, the offer of termination will not be financially viable for Lyca. NPT has changed the requirements for Lyca's agreements, but without imposing corresponding changes in the wholesale market (market 15) or the transit market.

NPT's assessment

As stipulated in NPT's recommendations to appeals by TDC and Ventelo against NPT's decision of 5 August 2010 in market 15[5], NPT believes that regulation of termination charges can increase the risk of a margin squeeze for buyers of regulated access. NPT also believes that a buyer of access, for a specific service, will have a negative margin for receiving calls from external networks if the price he pays for access is higher than the price he can charge for termination of the same call.

However, in NPT's opinion, the problem relating to the relationship between access prices in the market for access and call origination on mobile networks and termination charges in market 7 is reflected in the decision in market 15 through the requirement for non-discrimination and accounting separation. Telenor shall demonstrate in the accounting separation that the company's retail activity will achieve a positive margin by using the terms that are given to the buyers of regulated access. Revenues from termination and costs for buying access are both included in the specification. A situation where the access charge is higher than the termination charge will thus reduce the potential for Telenor to demonstrate a positive margin in the specification of accounting separation. The combination of non-discrimination and accounting separation will therefore set requirements for a positive margin at a more aggregate level than on the termination product in isolation. NPT believes that this regulation will be adequate to safeguard the intention that buyers of access shall be able to achieve a reasonable profit overall. NPT also believes that the use of remedies in market 15 as a result of NPT's decision of 5 August 2010 is appropriate and necessary for addressing the margin squeeze situation that Lyca draws attention to, and is not disproportionately burdensome for Telenor. NPT's decision was upheld by the Ministry of Transport and Communications in a decision of 6 April 2011.

Lyca has entered into an agreement on MVNO access with NetCom, and NetCom is not regulated in the access market. However, NPT is of the opinion that the regulation of Telenor in market 15 acts as a guideline for NetCom's possible actions as a provider of access in the same market.

With regard to Lyca's statement in connection with the regulation of the transit market (former market 10), NPT notes that the Authority has given notification of the removal of the

---

[5] http://www.npt.no/ikbViewer/Content/123361/M15%20-%20Innstilling%20til%20TDC%20og%20Ventelos%20klager.pdf

regulation of this market[6]. NPT refers here to the Authority's updated analysis of the market, which concludes that the transit market does not pass the three-criteria test. The relevant transit market does not, therefore, qualify for *ex ante* regulation. NPT's conclusion on the deregulation of the transit market is in accordance with the Commission[7]/ESA's[8] updated recommendations on relevant markets for *ex ante* regulation.

4.1.2 Lyca is a new operator in the Norwegian market

Consultative input

Lyca (page 10) believes that the company should be granted a period with higher termination charges during a start-up phase, as was the case for other operators in the Norwegian market. NPT has not offered any grounds for denying Lyca the same opportunity to establish a customer base.

Lyca further believes that NPT has not considered that a large share of Lyca's traffic terminates in other networks, particularly outside Norway. These termination charges have not been reduced. Lyca has also incurred substantial start-up and marketing costs for setting up in the Norwegian market. Since Lyca only offers prepaid subscriptions, the company does not have any opportunity to offset the loss of termination revenues by adjusting terminal subsidies or fixed subscription fees. Lyca's only opportunity for offsetting reduced termination revenues is increasing the minute rates at retail level.

NPT's assessment

It is incorrect to say that NPT has not given grounds for denying Lyca the same start-up period with higher termination charges as other operators in the Norwegian market. NPT has discussed this question in section 5.4.2 of the notification. NPT cannot see that Lyca has introduced any new elements that are not covered in NPT's assessment, and therefore refers to the assessment in section 5.4.2.

With regard to Lyca's costs for termination in other networks, NPT refers in section 5.4.5 of the notification to the fact that Lyca's costs for termination on other Norwegian networks will gradually fall as the regulated termination charges are reduced. To the degree that Lyca sends a large volume of traffic abroad, the price for termination in these networks is outside the scope of NPT. Termination charges in most European countries are generally falling, and Lyca will also benefit from this. Irrespective of this, Lyca must sets its retail prices based on the costs they are faced with at any given time. NPT also points out that any rebalancing of retail prices where the traffic flows between mobile and fixed networks and between different mobile networks to a greater extent are reflecting underlying costs, will give more effective pricing in terms of socio-economics, cf. also section 5.4.5 of the notification.

4.1.3 Basis for price controls

Consultative input

The Norwegian Competition Authority (page 2) notes that in the previous consultation on market 7 it pointed out that the Commission recommends pure LRIC as a basis for price controls in termination. NPT's proposal for the use of LRAIC thus means that the regulation is not determined in line with the Commission's recommendation. The Norwegian

---

[6] http://www.npt.no/ikbViewer/Content/126326/M10-3Ktest_og_varsel-2812011.pdf

[7] The European Commission's recommendation: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:344:0065:0069:EN:PDF

[8] EFTA Surveillance Authority's (ESA's) recommendation: http://www.eftasurv.int/media/esa-docs/physical/15344/data.pdf

Competition Authority also observed that the consideration to harmonisation means that NPT should follow the recommendation, and that the preface of the recommendation notes that high termination charges may lead to reduced consumer welfare and distortion of competition between the fixed network and mobile market.

NPT's assessment
NPT considered corresponding comments from the Norwegian Competition Authority prior to the decision in market 7. We therefore refer to section 6.4.3 of the decision of 27 September 2010 and to section 5.2 in the results of the consultation (annex 2 of the decision), where NPT's reasons for its choice of cost basis are given. The same basis should be used for price controls for all operators in market 7 in order to prevent distortion of competition in the national market, and NPT has therefore decided that it is not appropriate to use pure LRIC for Lyca in this regulation period.

5 Other factors

5.1 Cross subsidisation to the benefit of Lebara

Consultative input
Lyca (page 9) believes that if Lebara AS is permitted to retain its high termination charge, this will lead to a major disadvantage for Lyca in the competition. NPT must ensure that extra revenues for termination with Network Norway are exclusively used to finance network expansion. Termination revenues must not be used for the cross subsidisation of wholesale prices for Lebara or lower retail prices with Lebara.

NPT's assessment
NPT's decision of 27 September 2010 includes a prerequisite that extra termination revenues for Network Norway shall be used to finance the development of the third mobile network. NPT is following this up by setting a requirement for half-yearly reporting from Network Norway on the progress in the network expansion, cf. section 6.5.4.8 of the decision. The decision stipulates that the price controls may be changed if the progress does not meet the requirements set to a sufficient degree. Beyond this, NPT has not identified a need to set restrictions on Network Norway's organisation and financing of its own business.